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No. 87-1627

In The

Supreme Court of the United States

October Term, 1987

CLAYBORN E. NASH AND
GORDON R. COOPER II,

Petitioners,

vs.

CITY OF HOUSTON CIVIC CENTER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether the Court of Appeals correctly applied the requirements of *Hensley v. Eckerhart* to the Plaintiff's request for attorney's fees?

LIST OF ALL PARTIES TO THE PROCEEDINGS

CLAYBORN E. NASH of Houston, Texas – Lead Plaintiff in the class action below and only a nominal Petitioner here.

ALVIN MOORE of Houston, Texas – only Prevailing Plaintiff below and should be listed as a Petitioner before this Court, but is not presented as such in the Petition for Writ of Certiorari.

GORDON R. COOPER II of Houston, Texas – Attorney for the class members and for Alvin Moore individually through the trial of the liability issues.

CITY OF HOUSTON CIVIC CENTER is a department of the City of Houston, Texas, a municipal corporation.

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COUNTERSTATEMENT OF THE CASE

Although Petitioners' "Statement of the Case" (Petition at 4-7) correctly sketches the chronology of events bringing this litigation to this Honorable Court's doorstep, it also tends to obscure the nature of the issue currently presented and thereby make it seem more complex than it actually is. As a consequence, a different perspective is offered by this counterstatement.

This is not a simple case in which a single plaintiff sued and won a case of employment discrimination and then was denied a properly presented request for an award of attorney's fees. At times Petitioners seem to suggest at least by implication that this is such a case. The present issue is in some ways analogous to a small piece of debris that was accidently propelled far away from the scene of a pitched battle. Long after the conclusion of the battle, a stranger discovers this unusual object and is perplexed in trying to understand it. With some knowledge of that distant battle this stranger could better comprehend the nature of the fragment and its relation to that conflict. In that vein, it must be pointed out that the real focus of the litigation below, both in the District Court and the Court of Appeals, was a class action styled *Clayborn E. Nash v. City of Houston Civic Center*, Civil Action No. H-79-832, brought by black part-time parking attendants employed by the City of Houston Civic Center. They alleged that their part-time classification, which did not include the same benefits given full-time employees, was racially discriminatory because the parking attendants, as a group, were predominantly black, though the white parking attendants held the

same part-time classification. It was the *Nash* suit to which Petitioner Gordon Cooper's time as an attorney was largely devoted from its filing in 1979, through discovery, a hearing on class certification, and trial on the issue of liability.

In contrast, the claim of Alvin Moore, for which attorney's fees are now being sought, was at best a minor issue – a fragment that later would be totally separated from the main battle. It was filed in April, 1981, as a separate suit, *Alvin Moore v. City of Houston Civic Center*, Civil Action No. H-81-1471. In 1982, it was consolidated with *Nash* upon the City's Motion. (See the Docket Sheet of No. H-81-1471) Compared to the claims at issue in behalf of the class, Moore's claim was simple. As a supervisor of the parking attendants, Moore was a full-time employee, not a class member. (Petitioners' Appendix at A-6). He applied for the position of Parking Garage Manager in 1980 but was not selected. (A-7) The District Court found that he was denied the position in retaliation for giving testimony in support of Nash's claims. (A-6-7) Moore was granted the resulting salary differential as backpay in the amount of $22,550. (A-7-8, A-13) The Court of Appeals affirmed this finding as not clearly erroneous. (800 F.2d at 497)

Petitioners incorrectly state that in "an almost unprecedented act" the Court of Appeals "reversed the attorney's fees awarded Moore's trial counsel, Mr. Cooper" (Petition at 6) because this suggests that the District Court had somehow awarded attorney's fees separately for Moore's claim. In fact, the award of $76,875.00 to Cooper was for his total representation of

the class members and of three individual plaintiffs through the trial of the liability issue. (A-21) Since Moore was the only prevailing party even arguably entitled to attorney's fees, it is not surprising that the Court of Appeals set aside the total award that was largely for work done in behalf of non-prevailing parties.

Nor was it surprising that the Court of Appeals was convinced from its own review of the record that "only trivial effort was expended by counsel on Moore's personal claims. . . ." (800 F.2d at 497) Moore's claim of retaliation was relatively limited in nature: either he was denied a promotion because of retaliatory motives or he was not. The record was clear that the testimony concerning his retaliation claim was almost exclusively that of Moore himself and that of Jim Gatlin, an Assistant Director in the Civic Center. Neither the District Court nor the Court of Appeals concluded that Moore's claim required any extensive analysis. (A-6-7, A-13; 800 F.2d at 497) No novel legal questions were involved. The issue was simply one of credibility.

Yet the Court of Appeals did not completely foreclose the possibility of an award of attorney's fees for Moore as a prevailing plaintiff and invited affidavits on that issue on a motion for rehearing. (800 F.2d at 497) Cooper's affidavit which he filed on rehearing was basically the same affidavit he had previously filed with the District Court in 1985 in support of fees for all of the claims. (*Cf.* Petitioners' Appendix, F-1-18 and Docket Entry #139) Inexplicably it still included entries for work going back to 1977, some four years before Moore's suit was filed. (F-5-8) In his affidavit on

rehearing Cooper in essence admitted his time records were not kept separately on Moore's claim but nevertheless asserted in conclusory fashion that one-fourth of the total hours claimed were "attributable to Moore." (F-1) The Court of Appeals denied the request. 805 F.2d 1030. No petition for writ of certiorari was filed regarding this action by the Court of Appeals. In effect, Cooper "appealed" the issue of his fee entitlement back to the District Court by filing a "Second Motion for Attorney's Fees." The District Court denied that request. That denial was appealed to the Court of Appeals which affirmed. It is the latter action of the Court of Appeals for which Petitioners now seek review by this Honorable Court.

REASONS FOR DENYING THE WRIT

This case is not one meriting review by this Honorable Court. Petitioners have not established any of the considerations set forth in this Court's Rule 17. Despite their suggestions to the contrary (Petition at 11-13, 23-24), the decision of the Court of Appeals is not in conflict with any other decision of another Court of Appeals or of this Court. This case presents no important legal issue that this Court has not decided but should decide. The actions of the lower courts were not of such a nature as to call for an exercise of this Court's power of supervision.

I. The Court of Appeals Correctly Applied the Requirements of *Hensley v. Eckerhart* to the Plaintiff's Request for Attorney's Fees.

Petitioners argue that the Court of Appeals ignored *Hensley v. Eckerhart*, 461 U.S. 424 (1983) in denying fees (Petition at 11) but in reality it is Petitioners who are ignoring its clear teachings. First, it is clear that Moore's claim for relief did not involve a common core of facts nor was it based on related legal theories connected with the allegations of the class members. Thus, the class claims and the individual claims of the three named Plaintiffs must be reviewed as a series of discrete claims. As this Court observed in *Hensley*:

> "In some cases, a plaintiff may present in one lawsuit distinctly different claims for relief that are based on different facts and legal theories. In such a suit, even where the claims are brought against the same defendants . . . counsel's work on one claim will be unrelated to his work on another claim. Accordingly, work on an unsuccessful claim cannot be deemed to have been 'expended in pursuit of the ultimate result achieved,' *Davis v. County of Los Angeles*, 8 E.P.D. at 5049. The congressional intent to limit awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim." 461 U.S. at 434-435.

If this is to be the case for distinct claims by the *same* plaintiff, it follows *a fortiori* that where distinct claims are by *different* plaintiffs, no fee is available on the unsuccessful plaintiffs' claims. Thus, the Court of Appeals correctly set aside the District Court's fee award. (*Cf.* Petition at 13)

If attorney's fees may be allowed to Moore alone as the only successful claimant, the next question to be examined is in what amount. Here, too, *Hensley* provides significant guidance:

> "the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates. The applicant should exercise 'billing judgment' with respect to hours worked . . . and should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims." 461 U.S. at 437.

In his concurrence, Chief Justice Burger added these common sense observations:

> "I read the Court's opinion as requiring that when a lawyer seeks to have his adversary pay the fees of the prevailing party, the lawyer must provide detailed records of time and services for which fees are sought. . . . A district judge may not, in my view, authorize the payment of attorney's fees unless the attorney involved has established by clear and convincing evidence that time and effort claimed and shown that the time expended was necessary to achieve the results obtained." 461 U.S. at 440-441.

It is obvious that the Court of Appeals had these teachings of *Hensley* in mind when it observed:

> "The record convinces us that trivial effort was expended by counsel on Moore's personal claim and that remand for consideration of attorney's fees isolated for this cause is unwarranted. If affidavits to the contrary are presented on motion for rehearing, they will be considered." 800 F.2d at 497.

Under *Hensley* the key word is "isolated"! Cooper's affidavit and time records in support of attorney's fees

were clearly inadequate in that regard. Although it is flatly asserted (Petition at 6) that Mr. Cooper's affidavit showed that some 128 of the 512 total hours of attorney time were devoted to Moore's claim, that is not so readily apparent from reviewing the time records submitted. In the affidavit (F-1) he admitted that he kept his time records without reference to the particular plaintiff for which the services were performed. Beyond making this conclusionary assertion, nowhere does Mr. Cooper explain or support his contention that 128 hours were somehow attributable to Moore's claim. It may simply stem from an arbitrary division of clients, i.e. the class as one entity and the three individual plaintiffs. However, it must be remembered that the total hours claimed (512) cover a time-span from 1977 to 1985, while Moore's suit was not filed until mid-1981. If, indeed, one-fourth of the total hours were devoted to Moore's claim, then more than one-fourth of the hours claimed from mid-1981 to 1985 had to be expended in behalf of Moore. The entries made do not reflect that fact. To the contrary, as any experienced lawyer familiar with class actions would anticipate, the bulk of the entries relates to the claims of the class. Cooper's affidavit and time records merely confirmed the initial conclusion by the Court of Appeals that only trivial effort had been expended on Moore's claim.

Petitioners rely on *Tomazzoli v. Sheedy*, 804 F.2d 93 (7th Cir. 1986); *Zabkowicz v. West Bend Co., Div. Dart Industries*, 789 F.2d 540 (7th Cir. 1986); *Gekas v. Attorney Registration and Disciplinary Com'n.*, 793 F.2d 846 (7th Cir. 1986); and *Jordan v. United States Dept. of Justice*, 691 F.2d 514 (D.C. Cir. 1982), for the general

proposition that prevailing plaintiffs are usually awarded attorney's fees. (Petition at 18-19, 22) However, at least two of these cases also stand for the proposition that where a fee request is so egregious or an attorney's recordkeeping is so inept, a complete denial of attorney's fees may be warranted. *Zabkowicz, supra*, 789 F.2d at 550. In *Jordan, supra*, it was observed that:

> " . . . the Court may, as a means of enforcing the applicable standards, deny a fee motion when the submission is 'manifestly inadequate.' . . . [I]n suitable circumstances, disallowance of attorney's fees would serve as a 'means of encouraging counsel to maintain adequate records and submit reasonable, carefully calculated and conscientiously measured claims.'
>
> "Total denial of requested fees as a purely prophylactic measure, however, is a stringent sanction, to be reserved for only the most severe of situations, and appropriately invoked only in very limited circumstances. Outright denial may be justified when the party seeking fees declines to proffer any substantiation in the form of affidavits, timesheets or the like, or when the application is grossly and intolerably exaggerated, or manifestly filed in bad faith." 691 F.2d at 518.

The present case falls within these standards meriting an outright denial of attorney's fees. The request for 128 hours for handling a simple retaliation claim is excessive and egregious, and it is evident that the recordkeeping for the work on Moore's claim was virtually non-existent. The presence of these factors firmly support the action of the Court of Appeals in denying fees.

This case presents no significant legal issue that this Court needs to address. Instead it is only a glaring example of the failure of an experienced attorney to keep adequate time records relating to his services for a prevailing plaintiff. Petitioners rhetorically maintain that the "denial of attorney fees awards to successful civil rights litigants is a grave and unconscionable precedent for this area of our jurisprudence." (Petition at 23) The denial of attorney's fees in this case will not, as Petitioners assert (*id.* at 18), chill the undertaking of civil rights litigation but rather will merely serve as an effective warning that the requirements of documentation for fee claimants are meaningful and will be enforced by the Courts.

CONCLUSION

For all of the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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